RECENT AMERICAN DECISIONS.

Court of Appeals of Kentucky.

THOMAS FARMER *v.* GREGORY & STAGG.

When an agreement is reduced to writing, and although not signed, is acted upon by the parties, parol evidence is not, in the absence of fraud or mistake, admissible to add to, vary or contradict its terms.

Where a warehouseman sells goods in his warehouse under a general authority to sell, given to him by the owner, the property passes and he may give a second warehouse receipt to the purchaser, notwithstanding there is a receipt still in the hands of the first owner. The Kentucky Warehouse Act of 1869, prohibiting the issue of a second warehouse receipt without the production of the first, does not apply to such a case.

ACTION to recover possession of goods described in a warehouse receipt. The facts of the case were as follows: Taylor issued to Gregory & Stagg, a warehouse receipt for certain barrels of whiskey. At the same time Gregory & Stagg entered into the following agreement with Taylor:

"We make advances in money or accept drafts for a commission of 2½ per cent., this to cover two renewals of four months' paper, making the commission 2½ per cent. per annum. The paper we take we discount at 10 per cent. per annum. When you can do better at home, we will accept your drafts, the amount per gallon or barrel for purposes of collateral to be agreed upon. Free goods we usually do not go beyond three-fourths the cash value, we to have one dollar per barrel on sales in bond of all goods advanced on, whether we sell, or you make sale, and 2½ per cent. on all tax-paid goods advanced on, sold by us or you. When required to guarantee sales, we charge 2½ per cent. commission on amounts so guaranteed; when sale is made of goods advanced on by us, and you do not require the guarantee, other goods can be placed in our hands, as collateral in their stead. We can carry, on the above terms all you want carried, and as long as it will pay you to carry."

This agreement was reduced to writing, but not signed by the parties. Afterwards Taylor sold the whiskey to Farmer and issued to him a warehouse receipt therefor, Farmer having no notice of the outstanding receipt to Gregory & Stagg. This action was afterwards brought by Farmer against Gregory & Stagg to recover possession of the whiskey, plaintiff claiming that the sale to him was made by Taylor under the above agreement.

The answer of Gregory & Stagg admitted that the agreement was entered into, but insisted that it did not authorize Taylor to sell and convey title to the whiskey covered by their receipt. The evidence showed that transactions under this agreement between Taylor and Gregory & Stagg, were had to the amount of at least $150,000, but that there was in the meantime, only one sale by Taylor of whiskey for which Gregory & Stagg held receipt. This last-mentioned sale by Taylor was sanctioned by Gregory & Stagg, accompanied with the suggestion that they preferred that, in the future, their approbation should be obtained by Taylor before making sale of whiskey for which they held receipts. This transaction was prior to the sale by Taylor to Farmer, but unknown to the latter.

On the trial defendant offered parol evidence to explain the above agreement, and this evidence was admitted by the court. A verdict was rendered for defendant, and judgment entered thereon, whereupon this appeal was taken.

J. & J. W. Rodman, for appellant.

W. P. D. Bush and *D. W. Lindsey,* for appellee.

The opinion of the court was delivered by

HINES, J.—Instruction No. 5, given by the court below, requires as a condition precedent to the liability of Gregory & Stagg, first that the jury shall find that Gregory & Stagg authorized Taylor to sell the whiskey; and second, that Gregory & Stagg authorized Taylor to issue a warehouse receipt therefor. It was error in the court to make the right of recovery depend upon the establishment of both these facts, when proof of the authority to sell carries with it, as an incident, the right to issue the warehouse receipt. The property in the whiskey, where the sale is made with the consent and by authority of the holder of the first receipt, passes to the purchaser, regardless of the fact of the issuing or surrender of receipts.

Section 7 of the Warehouse Act of 1869, does not apply to a case like this. That portion of the section forbidding the issuing of a second receipt without the production of the prior receipt accompanied by the written consent of the holder of the prior receipt, is in the interest of commerce and of the negotiability of such receipts and for the protection of the holder of the second receipt. It is

for the prevention of fraud, and not to encourage it, as would be the case if the holder of the first receipt were permitted to repudiate the oral authority, given to the original owner of the property, by which he obtains the money of an innocent purchaser for value who has been misled by the silence of the first receipt holder, who permits the original owner to retain possession with every indicia of ownership. The holder of the first receipt who gives the oral authority to sell is as much estopped to deny the authority to sell and the title in the innocent purchaser as he could be if he had stood by in person and acquiesced in the sale without asserting claim. Any other construction would sanction and encourage combinations for the perpetration of frauds that would effectually defeat the beneficial purposes designed to be accomplished by the passage of the Warehouse Act.

The written evidence of the agreement between Taylor and Gregory & Stagg is entitled to as much consideration as if they had each signed it. The object of reducing the terms of a contract to writing is to make them certain, and the object of the signature is to identify the writing and to make manifest the fact of deliberation accompanying the consummation of the contract. These objects may be accomplished, as in this instance, by reducing the terms to writing, by delivery, acceptance, and the conduct of business under the agreement, as effectually as if the signatures of the parties were appended. The terms of a contract thus executed must be taken to speak the solemn agreement of the parties, and can no more be altered, added to or varied than any other written contract, which purports on its face to contain the whole of the agreement between the parties. If parol evidence were permitted, in the absence of an allegation of fraud or mistake, to effect it, the same evidence would be competent as bearing upon the same writing when signed by the parties entering into the agreement. If the writing appeared upon its face to be a loose or incomplete memorandum of an agreement, parol evidence would be competent, without alleging fraud or mistake, to show what the contract in fact was; but it is not such a memorandum, and the effect of the oral evidence admitted is to show that the terms used by the contracting parties did not express their meaning. It is true that Stagg testifies that the writing does not contain the whole of the agreement, and that it was not understood to authorize Taylor to sell whiskey for which Gregory & Stagg held warehouse receipts; but the same might be

said of every deliberately-written contract, and the conservative rule excluding parol evidence thereby effectually nullified.

The expression in the writing exhibited, "We to have one dollar per bbl. on sales in bond of all goods advanced on, whether we sell or you make the sale, and 2½ per cent. on all tax-paid goods advanced on, sold by us or you," taken in connection with the whole tenor of the instrument, manifestly makes it a dispositive document, which was intended to confer upon Taylor the authority to sell whiskey upon which advances have been made by Gregory & Stagg. As to the simple question of the authority to sell, the language is unequivocal and without ambiguity, and cannot, therefore, be contradicted, added to or varied without allegation and proof of mistake or fraud. The authority to sell being without limitation or condition, to permit parol evidence to establish that the sales were to be made upon condition that the permission of Gregory & Stagg should be first obtained, would be to make a new contract between Taylor and Gregory & Stagg, and consequently to annul the written agreement. All the circumstances surrounding the contracting parties at the time of making the contract evidenced by the writing, as well as the manner in which they transacted business under the agreement, prior to the purchase by appellant, may be shown, to determine whether there was other whiskey in the hands of Taylor belonging to Gregory & Stagg, for which they held no warehouse receipts, and to which, therefore, the authority to sell may have been intended to extend, instead of to such as, under their agreement, was to be covered by the warehouse receipts. Such evidence would be competent for the purpose of identifying the subject-matter of the contract, but not for the purpose of showing that the parties did not mean what the language of their agreement naturally imports: Greenleaf, vol. 1, secs. 281–2; Whart. on Evid., secs. 920–3; *Castleman* v. *Southern Mutual Life Insurance Company*, 14 Bush 197.

For the reasons suggested, we conclude that the court erred in instructing the jury as to the law of the case, and in admitting Stagg to testify as to his understanding of the meaning of the terms used in the written instrument, and also in permitting him to state, in the present condition of the pleadings, that the writing did not contain all the terms of the contract entered into between Taylor and Gregory & Stagg at the time the writing was made.

Judgment reversed, and cause remanded, with direction for further proceeding.